BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TAMERA K. BARKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 213,494
GRACE, UNRUH & PRATT, L.C.	)	
Respondent	)	
AND	)	
	)	
ST. PAUL FIRE AND MARINE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on April 28, 1998.

ISSUES

Respondent disputes the compensability of this claim as arising out of and in the course of claimant's employment with respondent. Specifically, respondent alleges claimant suffered a subsequent, intervening injury on January 14, 1998, which relieves respondent of liability for this claim.

Claimant raises an issue concerning the Appeals Board's jurisdiction to decide this appeal from a preliminary hearing order for medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes for the reasons stated below that the Administrative Law Judge's Order for medical treatment should be affirmed.

Findings of Fact

1. Although both parties allege in their briefs that claimant began experiencing shoulder pain, neck pain, and headaches in approximately October of 1997, this claim actually goes back farther. Claimant initially alleged injury by a series of accidents beginning April 1, 1996 through June 4, 1996. At the April 28, 1998, preliminary hearing, counsel for claimant orally amended the alleged dates of accident to May 1997 through April 28, 1998.

2. Claimant had been rated and released by the treating physician, Blake C. Veenis, M.D., in May of 1997. Thereafter, she continued to have symptoms for which she took medication and used a TENS unit that had been prescribed for her.

3. In approximately October 1997 her ongoing symptoms began to worsen. During this time her employer encouraged her to seek additional medical treatment. Claimant did not return to Dr. Veenis, however, because she did not think there was anything he could do.

4. During the period of October 1997 through December 1997, claimant's condition continued to worsen. Her employer, Mr. Brian Grace, testified to several incidents at work that aggravated claimant's condition. Also, on January 14, 1998, claimant drove to work through inclement weather conditions which caused her stress that further aggravated her symptoms.

5. On January 20, 1998, claimant returned to Dr. Veenis and told him that her symptoms had substantially worsened since the January 14 incident and that she felt the driving ordeal may have been the cause of her worsened condition. But claimant also testified that she continued to work after the January 14, 1998, incident and that her work activities made her condition worse. Mr. Grace testified that he had observed a further worsening of claimant's condition at work after January 14.

6. In his report of January 30, 1998, Dr. Veenis states the diagnosis he has given claimant "included myofascial pain of the cervical, thoracic and periscapular regions, right worse than left, as well as tension headaches related to this and borderline slowing of the right ulnar nerve conduction velocity across the elbow." He considered these diagnoses to be work related. Dr. Veenis attributed claimant's January 20, 1998, complaints of increased pain to be related to increasing myofascial pain. Dr. Veenis' report goes on to state:

> She also indicated in her history she had some mild slow worsening of her symptoms over the past three months, but the majority of her increase in her pain she felt occurred on 01/14/98. She denied any new injuries or accident that may have caused that but she did state that morning the weather was very bad with icy roads and she was very tense while driving and the drive took longer than usual and her symptoms worsened after that and she felt

> that may have been the cause of her worsened condition. As you may recall in my note of 05/27/97 I did feel that her myofascial pain was a result of her work activities. At the present time I still feel that is the case but with regards to her worsened symptoms that began on 01/14/98, I cannot state that this worsening is directly related to her work activities because based on her history she related it to the increased stress and tension of driving into work that day. It appears to me that she has had an exacerbation of a previous work condition though more than likely it is from a non-work situation of 01/14/98.

Conclusions of Law

The Appeals Board has jurisdiction to consider the issue of whether there was an intervening accident or injury because it goes to the question of whether the injury for which claimant is seeking benefits arose out of and in the course of her employment with respondent. K.S.A. 44-534a(a)(2).

This is a case where the interests of the respondent and the insurance carrier are in conflict. The respondent has been paying for claimant's medical treatment which it authorized but that the insurance carrier has refused to pay. The insurance carrier has based its denial of medical benefits upon the January 30, 1998, report by Dr. Veenis wherein he attributes claimant's recent worsening to the non work-related driving episode.

Dr. Veenis attributed claimant's worsened condition to the drive on January 14, 1998, because that was the history he was given. At the preliminary hearing, however, claimant and her employer testified to a series of incidents at work that contributed to the worsening of her condition. Also, claimant testified that her work in general had resulted in a worsening of her condition. Dr. Veenis' otherwise persuasive causation opinion is overcome by the testimony of the claimant and her employer.

At page 9 of the preliminary hearing transcript, claimant described her job duties as follows:

> I do a lot of computer work and a lot of work with heavy notebooks where I am constantly bent over my desk, kind of hunched up, going through papers, putting papers in notebooks, taking papers out of notebooks, things like that.

When asked what effect that work has had on her since January 14, 1998, claimant answered "I have gotten increasingly worse. I can't get any relief from my symptoms." The Appeals Board does not view the claimant's drive to work during inclement weather on January 14, 1998, as comparable to the performance of claimant's job duties over a period of months and years.

Generally, workers compensation laws require an employer to compensate an employee for personal injury or aggravation of a preexisting injury incurred through accident arising out of and in the course of employment. K.S.A. 44-501(a); Kindel v. Ferco Rental, Inc., 258 Kan. 272, Syl. ¶ 2, 899 P.2d 1058 (1995); Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987). The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact. Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

In Jackson v. Stevens Well Service, 208 Kan. 637, 643, 493 P.2d 264 (1972), the court held:

> [W]hen a primary injury under the Workmen's Compensation Act is shown to have arisen out of and in the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

Claimant is seeking medical treatment for a series of aggravations that occurred both before and after the January 14, 1998, driving incident. The question of whether the aggravation of claimant's condition is compensable under workers compensation turns on whether that aggravation stemmed from claimant's work-related activity or injury. *See* Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). Based upon the evidence presented, the Appeals Board finds that it did.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on April 28, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Vincent A. Burnett, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director